IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 17-1315-VAC-SRF
v.	)	
	)	
NEWMONT MINING CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

OPENING BRIEF OF DEFENDANTS NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT ON THE GROUNDS OF *FORUM NON CONVENIENS*

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I. NATURE AND STAGE OF THE PROCEEDINGS

On September 15, 2017, Plaintiffs Máxima Acuña-Atalya, Daniel Chaupe-Acuña, Jilda Chaupe-Acuña, Carlos Chaupe-Acuña, Ysidora Chaupe-Acuña, Elias Chavez-Rodriguez, M.S.C.C., and Maribel Hil-Briones ("Plaintiffs") filed their Complaint for Damages and Equitable Relief (the "Complaint") (D.I. 1) in the District of Delaware. Defendants Newmont Mining Corporation ("NMC"), Newmont Second Capital Corporation ("Newmont Second Capital"), Newmont USA Limited ("Newmont USA"), and Newmont Peru Limited ("Newmont Peru," and collectively, "Defendants") now file this Opening Brief in support of their Motion to Dismiss the Complaint on the Grounds of *Forum Non Conveniens*. Concurrently herewith, in lieu of an answer, Defendants have filed a Motion to Dismiss for failure to state a claim.

II. SUMMARY OF ARGUMENT

This case should be dismissed on *forum non conveniens* grounds. Peru presents an adequate alternative forum, and the balance of private and public factors set forth by the Supreme Court in *Gulf Oil v. Gilbert*, 330 U.S. 501, 505 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 240 (1981) favors the resolution of the matter in Peru.

III. INTRODUCTION

In this action, Plaintiffs—eight Peruvian citizens and residents of the remote Andes of Peru—ask this Court to adjudicate tort claims that have no connection whatsoever to Delaware, rather than litigate those claims in Peru, the forum where this action belongs. In fact—as Plaintiffs admit in their Complaint—the Peruvian courts have already adjudicated a number of related actions between the relevant parties, and two cases that will resolve the land dispute that underlies this controversy are currently pending in Peru. The Complaint alleges tortious conduct undertaken by three Peruvian entities, but fails to sue any of them; instead Plaintiffs name four

Defendants doing business in Colorado. Given the absence of any connection between this case and Delaware and the difficulties of trying the case in the United States, the doctrine of *forum non conveniens* favors the dismissal of the Complaint without prejudice.

Both the public and private interest *forum non conveniens* factors enumerated by the United States Supreme Court strongly support dismissal of Plaintiffs' claims so that they may be refiled in Peru. The gravamen of Plaintiffs' complaint is allegedly tortious contact between Defendants' alleged agents and Plaintiffs on disputed land in the Andes of northern Peru. The vast majority of witnesses to this dispute are Peruvian residents who cannot be compelled to testify in this action. The only other potential witnesses alleged in the Complaint are several of Defendants' officers and employees, who are mostly resident in Colorado. Not a single witness resides in Delaware. Likewise, virtually all of the documentary and forensic evidence is located in the Andes of Peru, and is likely in Spanish. Moreover, the dispute centers on the alleged actions of third parties over whom the Court lacks personal jurisdiction and subpoena power. These private interest factors raise serious concerns about the fairness of trying this case in this forum.

Furthermore, the public interest factors also favor dismissal. Given Peru's ongoing involvement in the land dispute between the parties and the development of its mining lands in general, as well as the Plaintiffs' residence in the country, Peru has a strong local interest in resolving this dispute and protecting the welfare of its citizens. Conversely, the only connections to Delaware are Defendants' articles of incorporation. The Delaware nexus is so slight that it would be inequitable to burden this busy Court and the citizens of Delaware with this case.

Plaintiffs, apparently recognizing the weakness of this dispute's connection to their desired forum, have attempted to show in their Complaint that Peru is not an adequate alternative

forum for their grievances by alleging (on information and belief) that Defendants have improperly influenced Peruvian courts to rule in their favor in the previous cases between the parties. However, courts have consistently found that Peruvian courts provide an adequate alternative forum. Plaintiffs' attempt to undermine the adequacy of the Peruvian forum is belied by their own Complaint, in which they admit that the Peruvian appellate courts have twice overturned lower court rulings in Defendants' favor. Indeed, Plaintiffs do not point to one outstanding civil or criminal judgment against Plaintiffs in favor of Defendants.

For these reasons, Defendants respectfully ask that the Court dismiss the Complaint on *forum non conveniens* grounds.

IV. STATEMENT OF FACTS

This case arises out of a property dispute in the Northern Andes of Peru, in the region of Cajamarca. In 2001, Minera Yanacocha S.R.L. ("Yanacocha"), a mining company in Peru and a majority owned direct and indirect subsidiary of the Defendants, acquired ownership and possessory rights to the land under dispute, a plot of land historically possessed and farmed by local *campesinos* (the "Disputed Land"). (Declaration of Javier Zapater ("Zapater Decl.") ¶¶ 2, 5.) Ten years later, Plaintiffs began living and farming on the Disputed Land, claiming rights of possession which they allegedly obtained in the early 1990s and which they alleged were never transferred to Yanacocha. (*Id.* ¶ 8.) The merits of the parties' positions turn on decades-old Spanish language real estate documents, the oral histories of the participants, and the complex and unique Peruvian property law governing community lands held by *campesinos*. (*Id.*)

In order to protect its possessory interests under Peruvian law, Yanacocha, and its contracted security personnel, have engaged in lawful activities to evict Plaintiffs from its land. (Zapater Decl. ¶ 9.) The Peruvian National Police ("PNP") has also been required to get

involved in policing the dispute. (*Id.*) Yanacocha denies that it has ever engaged in violent or harassing action against Plaintiffs. (*Id.* ¶ 10.) Supported by Peruvian and international NGOs (such as Plaintiffs' counsel of record), Plaintiffs have continually maintained a presence on Yanacocha's land since 2011 and for years had refused Yanacocha's attempts at dialogue. (*Id.* ¶ 12.)

The dispute has also spawned years of litigation in Peru, starting with a complaint Plaintiffs filed against Yanacocha May 2011. (Zapater Decl. ¶ 14.) As part of its efforts to resolve the land dispute, Yanacocha also initiated legal proceedings in the Peruvian courts:

- In 2011, a Peruvian court found Plaintiffs guilty of aggravated usurpation, but the Peruvian court of appeal overturned this finding and granted a new trial. (*Id.* ¶¶ 14, 16.)

- In 2011, Yanacocha sought an injunction to prevent Plaintiffs from using a portion of the Disputed Land. The Peruvian court found in Yanacocha's favor, however, in order to avoid conflict, Yanacocha refrained from enforcing the injunction. (*Id.* ¶ 15.)

- In 2014, a new trial was held on the aggravated usurpation charges, and Plaintiffs were found guilty. Again, the Peruvian court of appeal overturned. Yanacocha appealed this decision to the Supreme Court of Peru, which upheld the appellate court's decision and held that possessory rights in the Disputed Land must be determined by a civil action. (*Id.* ¶ 17.)

- In 2015, Yanacocha initiated two civil lawsuits in Peru to recover possession and ownership in the Disputed Land. These cases are currently pending. (*Id.* ¶ 18.)

Yanacocha has not been named as a party to this action. Instead, Plaintiffs have sued only United States entities.[1] Defendants are each Delaware corporations with their principal

[1] Indeed, including Yanacocha as a defendant in this action would defeat the Court's subject matter jurisdiction because Yanacocha is a resident of Peru. *Zambelli Fireworks Mfg. Co. v.*

places of business in Colorado. (Hudgens Decl. ¶¶ 2-5.) Defendant Newmont Second Capital, an indirect wholly owned subsidiary of NMC, owns 51.355 percent of Yanacocha. (Zapater ¶ 1.)

V. ARGUMENT

Courts should dismiss actions *forum non conveniens* grounds "where … the litigation can more appropriately be conducted in a foreign tribunal." *Gilbert*, 330 U.S. at 505. "[A] district court's resolution of a *forum non conveniens* issue should be guided by a three-step analysis, considering: (1) the availability of an adequate alternative forum to hear the case; (2) the appropriate level of deference due to the plaintiff's choice of forum; and (3) the relevant private and public interest factors." *Chigurupati v. Daiichi Sankyo Co.*, 480 F. App'x 672, 674 (3d Cir. 2012). In this case, each step favors the dismissal of the Complaint.

A. An Adequate Alternative Forum Is Available in Peru.

1. Defendants are Subject to Jurisdiction in Peru.

At the outset of any *forum non conveniens* inquiry, before determining whether an alternative forum is convenient, a court must first determine whether such an alternative forum exists. "Ordinarily, [the adequate alternative forum] requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper Aircraft Co.*, 454 U.S. at 255, n.22 (quoting *Gilbert*, 330 U.S. at 507); *see also Chigurupati*, 480 F. App'x at 674 (district court did not abuse its discretion in finding an adequate alternative forum where it could reasonably infer that the defendant was amenable to process in India).

Here, Newmont Peru may be subject to jurisdiction in Peru based on its business activities there. (Declaration of Angela Hudgens ("Hudgens Decl.") ¶ 5.) In any event, regardless of whether those activities would give rise to personal jurisdiction over Newmont

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Wood, 592 F.3d 412, 418 (3d Cir. 2010) ("[T]he absence of complete diversity deprives all federal courts of subject matter jurisdiction over this action.").

Peru, its parent company, or the other related Defendants, all four Defendants hereby moot this issue by stipulating (for purposes of this action only) to service of process and consenting to jurisdiction in Peru. *See Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 448 (D.N.J. 2005) ("Defendant does not have to provide the court with indisputable proof of its amenability to process in [the alternative forum]. However, if the court is unconvinced on this matter, then it may choose, in its discretion, to safeguard Plaintiffs' right to file suit against Defendant by conditioning dismissal on Defendant's actual consent to process in the foreign jurisdiction.")

2. Peru's Courts Provide an Adequate Alternative Forum.

Even when the parties are amenable to process in the foreign forum, in "rare" cases, the forum may not be an adequate alternative where the remedy offered is "clearly unsatisfactory" or the forum "does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 255 n.22. Courts have interpreted this narrow exception to mean that a defendant need only show that the plaintiff will not be deprived of all remedies in the alternative forum. *See, e.g., Wilmot v. Marriott Hurghada Management, Inc.*, C.A. No. 15-618, 2016 WL 3457007, *1 (D. Del. June 22, 2016) ("Since Egypt recognizes the subject matter of Plaintiff's action, I cannot conclude that the remedy offered is 'clearly unsatisfactory.'"); *Dawson v. Compagnie Des Bauxites De Guinee*, 593 F. Supp. 20, 24 (D. Del. 1984).

This rare and narrow exception has no applicability here. Peruvian law specifically recognizes, and provides remedies for, claims of personal injury and property damage caused by torts like those alleged by the Plaintiffs. (Declaration of Mario Castillo Freyre ("Freyre Decl.") ¶¶ 2-14.) Indeed, the Plaintiffs concede in their Complaint that each of their causes of action is actionable in Peru. (Compl. ¶¶ 354, 358, 362, 366, 369, 375, 380, 388, 394, 400, 404, 407, 416.)

Moreover, the federal courts confronted with *forum non conveniens* determinations have consistently found that Peru is a suitable alternative forum. *See, e.g., Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899, 904 (S.D. Tex. 1996), *aff'd* 113 F.2d 540 (5th Cir. 1997) (Peru an adequate alternative forum for claims of seven hundred Peruvian plaintiffs alleging injury from environmental damage); *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987) (trial court erred in denying motion to dismiss the wrongful death claims of Peruvian plaintiffs); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002) (dismissing plaintiffs' environmental claims both for failure to state a claim and, in the alternative, under *forum non conveniens*), *aff'd on other grounds*, 414 F.3d 233, 266 (2nd Cir. 2003); *Maxima International, S.A. v. Interocean Lines, Inc.*, No. 16-CV-21233, 2017 WL 346826, *2 (S.D. Fla. Jan. 24, 2017) (finding Peru to be an adequate forum for a breach of contract suit, but ultimately upholding a forum selection clause that required the action to be brought in Florida); *Sudduth v. Occidental Peruana, Inc.*, 70 F. Supp. 2d 691, 697 (E.D. Tex. 1999) (finding that Peru is an adequate alternative forum but holding that the balance of factors favored Texas); *Vargas v. M/V MINI LAMA*, 709 F. Supp. 117, 118 (E.D. La. 1989) (finding both Peru and Greece to be alternative fora, but that the balance of factors favored Greece).

Ignoring this consensus that Peru is an adequate alternative forum, Plaintiffs allege that the Peruvian courts are so corrupt that they are unable to obtain justice there. (Compl. ¶¶ 139-151, 348-352.) In general, allegations of corruption or other problems with an alternative forum's judicial system do not suffice to overcome dismissal on *forum non conveniens* grounds. *Wilmot v. Marriott Hurghada Management, Inc.*, C.A. No. 15-618, 2016 WL 2599092, *6 (D. Del. May 5, 2016) ("The alternative forum is too corrupt to be adequate does not enjoy a particularly impressive track record."); *see also Ritz Carlton*, 666 F. App'x at 185 n.2.

Federal courts have pointedly and repeatedly refused to declare a foreign legal system inadequate on the basis of generalized allegations of corruption. *See, e.g., Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006) (noting the heavy burden that would be required to support such a "dramatic holding"); *Blanco v. Banco Industrial de Venezuela, SA.*, 997 F.2d 974, 982 (2d Cir. 1993) ("[W]e have repeatedly emphasized that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.") (citations and internal quotation marks omitted); *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991) (same); *Monegasque de Reassurances S.A.M (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001) (*forum non conveniens* doctrine "serves precisely to avert . . . unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations"). U.S. courts simply are not equipped, for practical reasons as well as comity concerns, "to sit in judgment upon the integrity of [an] entire [foreign] judiciary." *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 488 (S.D. Tex. 2002); *see also PT United Can Co. v. Crown Cork & Seal Co*., 138 F.3d 65, 73 (2d Cir. 1998) ("such a finding is rare") (citation omitted).

Plaintiffs' allegations—on information and belief—that Defendants have used improper means to influence Peruvian judges are insufficient for this Court to find that the entire Peruvian legal system is so corrupt that Plaintiffs are unable to obtain any meaningful remedy there. (Freyre Decl. ¶¶ 15-20.) In any event, these allegations are belied by the Peruvian courts' decisions in the previous proceedings between the parties. As Plaintiffs admit, they themselves have accessed the Peruvian courts to address this dispute. (Zapater Decl. ¶ 14; Compl. ¶ 140.) Additionally, although the court initially found in Yanacocha's favor in a case for aggravated usurpation it brought against Plaintiffs in August 2011, the Appeals Chamber of the Superior

Court of Cajamarca reversed and ordered a new trial. (Zapater Decl. ¶ 16; Compl. ¶¶ 141-142.) Following a second trial, in August 2014, Plaintiffs were again convicted, but the sentence was again reversed by the appellate court. (Zapater Decl. ¶ 17; Compl. ¶¶ 143-144.) Yanacocha appealed, and the Peruvian Supreme Court upheld the appellate court. (Zapater Decl. ¶ 17; Compl. ¶ 145.) The fact that Plaintiffs have twice prevailed against Yanacocha in Peruvian courts greatly undermines any argument that Peru is an inadequate alternative forum.[2]

Finally, Plaintiffs contend that they cannot obtain justice in Peru because Defendants are not subject to jurisdiction in Peru. (Compl. ¶ 349.) As an initial matter, Plaintiffs do not explain how the monetary and injunctive relief sought against the American Defendants will be more just or effective than similar relief against Yanacocha and the other Peruvian entities alleged in the Complaint to have actually engaged in tortious conduct. In any event, as noted above, Defendants moot this argument by stipulating (for purposes of this action only) to service of process and consenting to jurisdiction in Peru.

B. These Foreign Plaintiffs' Choice of Forum Does Not Merit Deference.

The next step in the *forum non conveniens* analysis is to ascertain the appropriate deference to the Plaintiffs' chosen forum. *Chigurupati*, 480 F. App'x at 674. The burden of persuasion to show the convenience of the alternative forum is on the defendant, but the

[2] Additionally, although not related to Plaintiffs' ability to receive a fair trial in Peru on the allegations in the Complaint, Plaintiffs allege that they are "unable to obtain justice in Peru" because the Peruvian government's response to the abuses alleged in the Complaint has been insufficient. Again, Plaintiffs' conclusion is belied by the very allegations upon which they rely. The Complaint alleges that the Peruvian government "will travel to [the Disputed Land] twice a month . . . to verify the safety of Plaintiffs" and that "will also pay for [Plaintiffs'] phone bills." (Compl. ¶ 350.) Additionally, the Complaint alleges that the Peruvian Minister of Justice and Human Rights publically affirmed that the "government was coordinating with the police on a protection plan for the Plaintiffs." (*Id*. ¶ 351.) Far from demonstrating that the Peruvian judiciary is corrupt or biased in favor of Defendants and Yanacocha, these allegations show that government of Peru is actively invested in protecting Plaintiffs' rights.

magnitude of that burden decreases as the deference given to the plaintiff's choice of forum decreases. *Banco Nominees Ltd. v. Iroquois Brands, Ltd.*, 748 F. Supp. 1070, 1073 (D. Del. 1990). U.S. courts, including the Supreme Court, have consistently held that a foreign plaintiff's choice is afforded a low degree of deference. *See, e.g., Piper Aircraft*, 454 U.S. at 255 ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . . the presumption applies with less force when the plaintiff or real parties in interest are foreign."); *Windt v. Qwest Communications Intern., Inc.*, 529 F.3d 183, 191 (3d Cir. 2008) (district court did not abuse its discretion in giving Dutch plaintiffs' choice of forum a low degree of deference).

This lower degree of deference reflects a logical reluctance to assume that a foreign plaintiff's choice of American forum is a convenient one. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) ("When the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable."); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 875 (3d Cir. 2013) ("The lesser degree of deference typically afforded to foreign plaintiffs . . . is not intended to create difficulties for foreign plaintiffs, but is based instead on realistic doubts about the ultimate convenience of a foreign plaintiff's choice to litigate in the United States.") (quoting *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003)); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989). Additionally, because of concerns over forum shopping, a foreign plaintiff will be "offered some deference, but far less than would be offered to a domestic plaintiff suing in her home forum." *Allen v. Bongiovi*, Civ. No. 07-44, 2008 WL 9488939, *4 (D.N.J. Mar. 18, 2008).

As shown below, trying this case is plainly more convenient in Peru, where most, if not all, of the material witnesses, including the Plaintiffs, reside and where the government and the

judiciary are already embroiled in resolving the land use conflict between the parties. (Zapater Decl. ¶¶ 19-21.) Nevertheless, Plaintiffs have chosen to bring this lawsuit in Delaware, a forum with no connection to the actions alleged in the Complaint and virtually no connection to the parties. Accordingly, a healthy degree of skepticism about Plaintiffs' motives is warranted. The Court should afford a low degree of deference to Plaintiffs' choice of forum and impose a commensurate low burden on Defendants to show a Peruvian forum would be more convenient.

C. The Balance of Private Interest Factors Favors Dismissal.

A Court undertaking a *forum non conveniens* inquiry must next consider whether certain "private interest factors," as set forth by the Supreme Court in *Gulf Oil Corp. v. Gilbert* favor dismissal in favor of an alternative forum. "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant." *Gilbert*, 330 U.S. at 508.

> Important considerations are [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and [3] the cost obtaining attendance of willing, witnesses; [4] possibility of view of premises, if view would be appropriate to the action; and [5] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. In addition, the Court should weigh [6] "the enforceability of a judgment if one is obtained" and [7] "advantages and obstacles to a fair trial." *Id*.

A party seeking to dismiss an action on *forum non conveniens* grounds is not required "to describe with specificity the evidence they would not be able to obtain if trial were held in the United States." *Piper Aircraft*, 454 U.S. at 258. The Supreme Court has rejected the suggestion that "defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these would provide if the trial were held in the alternative forum," explaining that "[s]uch detail is not necessary." *Id*. Rather, the defendant "must provide enough information to enable the District Court to balance the parties' interests."

Here, Defendants have provided sufficient evidence to show that all seven factors support dismissal of this case, in favor of litigation in Peru.

1. The Sources of Proof Are in Peru.

Because "justice is better served by allowing the parties to resolve the[ir] dispute in a forum where the ease of access to sources of proof is more accommodating," *Syndicate 420 at Lloyd's, London v. Glacier Gen. Assur. Co.*, 604 F. Supp. 1444, 1448 (E.D. La. 1985), the forum with the greatest number of relevant witnesses and evidentiary materials is typically considered superior. *See, e.g.*, *Miller*, 380 F. Supp. 2d at 452 ("Where evidence relating to causation, injury, and damages is located exclusively within a foreign jurisdiction, the defendant has a much greater interest in obtaining a *forum non conveniens* dismissal."); *Banco Nominees, Ltd.*, 748 F. Supp. at 1073 (finding that the access to proof factor "strongly favors dismissing the case" where "there are no witnesses or evidence in Delaware").

Almost every witness, and nearly all documentary and physical evidence necessary to litigate this case, are in Peru. Plaintiffs themselves are resident in Peru. (Zapater Decl. ¶¶ 19-22; Compl. ¶ 23.) Employees of Yanacocha, Securitas A.B. ("Securitas"), and the PNP, who Plaintiffs allege engaged in the tortious conduct described in the Complaint, also reside exclusively in Peru. (*Id*.)

The basis of Plaintiffs' Complaint is that Defendants' agents engaged in dozens of harassing and violent acts, including assault, battery, infliction of emotional distress and intrusion on solitude. (Compl. ¶¶ 70-138.) Each and every one of these alleged acts occurred in or around the Disputed Land, in the country of Peru and thousands of miles away from Delaware. Indeed, it is difficult to imagine a case in which the witnesses would be more accessible in a foreign forum and less accessible in Delaware.

In addition, nearly all of the relevant documentary and physical evidence, consisting of correspondence between the parties, real estate documentation, medical records, court records, police reports, photos and videos, is in Peru. (Zapater Decl. ¶ 22.) Almost all of this documentation is in Spanish. Thus, the Peruvian courts are in a better position to assess evidence without the need to use interpreters, who create added expense and potentially introduce inaccuracies or confusion into the interpretation of evidence. (*Id*.)

To the extent any relevant evidence or witnesses are in the United States, they are not in Delaware. Defendants' primary places of business are in Colorado, and all of their corporate business records are also in Colorado. (Hudgens Decl. ¶¶ 2-5.)

Given the location of almost every material witness and all documentary evidence in Peru, and the complete absence of witnesses and evidence in Delaware, the first private interest factor, ease of access to sources of proof, militates strongly in favor of dismissal.

2. The Critical Witnesses Cannot Be Compelled to Provide Testimony.

The next factor this Court must consider is the availability of compulsory process for attendance of unwilling witnesses. Litigating this case in Delaware may very well deprive the Defendants of key witnesses. Third party witnesses such as employees of Securitas and PNP, doctors, and individuals involved in negotiations between Plaintiffs and Defendants are unlikely to be willing to travel to Delaware to testify. (Zapater Decl. ¶¶ 19-22.) Furthermore, it is unlikely that the Court would be empowered to compel their testimony.

Federal Rule of Civil Procedure 45(b)(2) states that "a subpoena may be served at any place . . . outside [the district of the issuing court] but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection." Fed. R. Civ. P. 45(b)(2); *see also Tannenbaum v. Brink*, 119 F. Supp. 2d 505, 512 (E.D. Pa. 2000) (explaining that if witnesses who are "spread out across the United States, Europe and the Caribbean . . . were unwilling to

appear, a Pennsylvania court could not compel them to do so"). This Court, therefore, cannot compel discovery and testimony from any of the many non-party witnesses who reside in Peru.

Moreover, Peru is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, *reprinted as a note to* 28 U.S.C. § 1781. See U.S. Dept. of State, TREATIES IN FORCE, Section 2, at 351-352 (2017), *available at* < https://www.state.gov/documents/organization/273494.pdf>.[3] Therefore, the essential evidence controlled by third parties in Peru is unavailable to Defendants in Delaware.

On the other hand, it is unlikely that litigating this case in Peru would deprive the Plaintiffs of unwilling witnesses. Plaintiffs and the third-party witnesses are resident in Peru. Because this Court has jurisdiction over the Defendants, this Court can require that the Defendants and the witnesses within their control submit to jurisdiction in the Peruvian courts as a condition of dismissing the case. *See Piper Aircraft Co*., 454 U.S. at 257, n.25.

3. Obtaining Testimony of Willing Witnesses Would Be Unduly Expensive.

Additionally, the cost of obtaining the attendance of witnesses, whether or not compulsory process is available, will be substantial. This cost weighs in favor of dismissing this action on *forum non conveniens grounds.* As discussed above, almost every witness resides in Peru. Therefore, if this case were to proceed here, each would be required to fly to the United States from Cajamarca and obtain accommodations for the duration of their testimony at trial at the parties' expense. Similarly, although depositions of party-controlled witnesses can be taken

[3] Although the U.S. and Peru are both signatories to the Inter-American Convention on Letters Rogatory, 14 I.L.M. 339 (1975), *reprinted as a note to* 28 U.S.C. § 1781, the U.S., in ratifying the treaty, specifically invoked the right under Article 2(b) to exempt from the operation of the Convention "letters rogatory that have as their purpose the *taking of evidence*." See 132 Cong. Rec. S15882-04, 1986 WL 787682 (emphasis added). Thus, not even the cumbersome process of letters rogatory is likely to be of any assistance in procuring evidence from these essential third party witnesses.

in Peru, such depositions will require counsel to travel to Cajamarca at a significant expense, especially in light of the number of witnesses to be deposed there. Currently, a one way flight from Cajamarca, Peru to Philadelphia, Pennsylvania booked three weeks in advance costs at least $450 and takes at least 17 and a half hours. (Hudgens Decl. ¶ 6.) Consequently, the availability of witnesses, and expenses associated with their testimony, also weighs in favor of dismissal.

4. The Property That Is the Subject of the Dispute and Where the Incidents Are Alleged to Have Occurred Is in Peru.

The Disputed Land is a piece of land located in a largely uninhabited area 12,000 feet above sea level. (Zapater Decl. ¶ 2.) The ownership and possession of the Disputed Land forms the basis of the dispute between the parties. (*Id*. ¶ 5.) All of the dozens of alleged instances of harassment and violence outlined in the Complaint occurred in or near the Disputed Land. Clearly, the trier of fact would benefit from viewing, or at least being familiar with, the location that is the subject of the dispute and where the alleged clashes have taken place.

5. Other Practical Problems Make Delaware an Inappropriate Forum.

An additional critical factor in favor of a foreign forum is the ability "to implead other potentially responsible parties." *Iragorri v. International Elevator, Inc.*, 203 F.3d 8, 15 (1st Cir. 2000); *see also Conservation Council of Western Australia, Inc. v. Aluminum Co. of America*, 518 F. Supp. 270, 277 (W.D. Pa. 1981); *cf. Piper Aircraft*, 454 U.S. at 259 ("The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland.").

Here, most of the alleged instances of violence and harassment in the Complaint were allegedly undertaken by Securitas or PNP. However, these entities are present in Peru, and, as far as Defendants are aware, do not have sufficient contacts with Delaware for this Court to have

jurisdiction over them. Defendants' inability to implead these parties, who Plaintiffs allege are directly responsible for the harm outlined in the Complaint, weighs in favor of dismissal.

Additionally, a trial in Delaware would require the extensive use of translators. All of the Plaintiffs in this case, and most third-party witnesses, are likely to be Spanish-speakers and nearly all of the relevant documents are likely to be in Spanish. *Lony*, 886 F.2d at 639 ("In considering whether the 'choice of one forum over the other will alleviate practical problems, making trial of the case expeditious and inexpensive,' the practical problem of the need to translate documents and the testimony of witnesses is a relevant concern.") (quoting *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980).

6. A Delaware Judgment May be Difficult to Enforce.

Even if Plaintiffs prevail, it may be difficult for them to enforce their requested remedy if the action proceeds in Delaware. Plaintiffs seek injunctive relief to prevent the "harassment" and "intimidation" described in the Complaint. (Compl. ¶¶ 410-415.) However, as shown above, nearly all of the "harassing" and "violent" actions described in the Complaint allegedly occurred in Peru by Peruvian actors. Therefore, in order for Plaintiffs to obtain meaningful relief, any injunction must necessarily be enforceable in Peru. It is clear that injunctive relief granted in Peru would be enforceable there, whereas an injunction issued in the United States may not be enforceable. *See Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 828 (2d Cir. 1990).

7. Obtaining a Fair Trial Will Be More Difficult in Delaware than in Peru.

There is no obstacle to a fair trial in Peru. Almost all the witnesses are Peruvian. All of the potential parties are subject to Peruvian jurisdiction. All the physical and documentary evidence is located in Peru, and as discussed in below, Peruvian law governs this dispute.

Conversely, the ownership and possessory rights in the Disputed Land will undoubtedly require adjudication in this action, in order to determine whether any of the alleged actions of Yanacocha, Securitas or PNP were privileged under Peruvian Law. (Zapater Decl. ¶¶ 10, 19.) Two civil cases to determine these ownership and possessory rights are already pending in Peru. (Zapater Decl. ¶ 18.) Therefore, Defendants will be disadvantaged by requiring witnesses to fly between Peru and Delaware to testify in each case. *See Banco Nominees*, 748 F. Supp. at 1076.

D. The Public Interest Factors Weigh in Favor of Dismissal.

A balance of the public interest factors also favors dismissal of this action. The public factors set forth by the Supreme Court include: (1) administrative difficulties from congestion when litigation is not handled at its origin; (2) imposition of jury duty on people of a community which has no relation to the litigation; (3) local interest in having localized controversies decided at home; and (4) familiarly with governing law and avoidance of unnecessary problems in conflicts of law or application of foreign law. *Gilbert*, 330 U.S. at 508-509.

1. Administrative Difficulties Favor a Peruvian Forum.

The Supreme Court has noted that courts should be wary of increasing the well-established congestion in domestic courts in order to litigate a case that is properly adjudicated in a foreign forum. *Gilbert*, 330 U.S. at 508-509; *see also Piper Aircraft*, 454 U.S. at 261 ("[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here"). This is especially true in this case, where vacant judgeships in the Delaware Federal District Court would add to the administrative difficulty of adjudicating this case.

In contrast, at least one court has found that the congestion in Peruvian courts is less significant than that in the United States. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 548

(S.D.N.Y. 2001) ("[T]he will-known congestion of American dockets is undoubtedly greater than that of less litigious societies like . . . Peru.").

2. Jury Duty Should Not Be Imposed on the Citizens of Delaware in a Matter Having No Connection with the State.

"Jury duty is a burden that ought not to be imposed upon people of a community which has no relation to the litigation." *Gilbert*, 330 U.S. at 508-509. As this case has virtually no connection to Delaware, there is no reason to burden its citizens with jury duty on this case. Accordingly, the imposition of jury duty on the citizens of Delaware is a public interest factor that also weighs in favor of dismissal.

3. Peru Has an Overwhelming Interest in This Controversy and Delaware Has Virtually None.

"There is a local interest in having localized controversies decided at home." *Gilbert*, 330 U.S. at 509. This interest weighs in favor of dismissing a case for *forum non conveniens*.

In this case, the government of Peru has already shown a strong interest in resolving the conflict between Defendants and Yanacocha, on the one hand, and Plaintiffs, on the other. As Plaintiffs admit, the Peruvian government has taken an active role in protecting the Plaintiffs from alleged abuses. For example, the Complaint alleges that the Peruvian government has declared that law enforcement "will travel to [the Disputed Land] twice a month on motorcycles to verify the safety of Plaintiffs. . . . The police will also pay for the phone bills of Máxima, Daniel, and Ysidora so they can alert the police if there is an emergency." (Compl. ¶ 350.) Additionally, according to the Complaint, the Peruvian Minister of Justice and Human Rights herself has publically confirmed that "the government was coordinating with the police on a protection plan for the Plaintiffs." (Compl. ¶ 351.) Finally, the Complaint alleges that the Peruvian government ordered Defendants to stop the expansion of their mining activities in 2011 following community opposition and protests. (Compl. ¶ 60.)

To the contrary, there is no local interest in having the case resolved in Delaware. If not for Defendants' incorporation here, Delaware would have no connection to the parties or the controversy at all. There can be no doubt that Peru's interest in regulating the mining industry and protecting its citizens against the alleged torts is more important than Delaware's interest in monitoring the international activities of the countless numbers of companies incorporated here. Peru's strong local interest in hearing this dispute and Delaware's lack of interest therefore weigh heavily in favor of dismissal.

4. Peruvian Law, Including Property Law, Will Govern This Dispute and Should Be (and Is Being) Decided by Peruvian Courts.

Finally, the Court should consider whether it would be forced to interpret and apply the substantive law of Peru. *Gilbert*, 330 U.S. at 509. The Supreme Court has found that "dismissal" is appropriate in cases such as this "where the court would be required to untangle problems in conflicts of laws and in law foreign to itself." *Piper Aircraft*, 454 U.S. at 251.

To determine the governing law, the Court should apply the choice of law principles of the forum state, i.e., Delaware. *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

Delaware courts use a two-part test to determine which sovereign's law to apply when there is a conflict: first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is a conflict, the court determines which jurisdiction has the "most significant relationship to the occurrence and the parties" based on the factors (termed "contacts") listed in the Restatement (Second) of Conflict of Laws. *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015). The contacts used to determine the most significant relationship are: (i) the place where the injury occurred; (ii) the place where the conduct causing the injury occurred; (iii) the domicile, residence, nationality, place of

incorporation and place of business of the parties; and (iv) the place where the relationship, if any, between the parties is centered. Restatement (Second) Conflict of Laws, § 145(2).

To the extent that the substantive law governing the applicable theories of liability and damages in this case differ between Peru and Delaware, a true conflict would exist and that conflict would be resolved in favor of Peruvian law. As explained above, there can be no doubt that Peru bears the more significant relationship to the events alleged in the Complaint and to the Plaintiffs, who are residents and citizens. *See* Restatement (Second) Conflict of Laws, § 145(2) cmt. e ("When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort.") On the other hand, Delaware has no obvious relationship to either the allegations in the Complaint or the parties, besides the bare fact that Defendants are incorporated here. (*See also* Freyre Decl. ¶¶ 9-11.)

Additionally, even putting aside potential conflicts of law issues, should the case proceed in Delaware, the Court will not be able to avoid interpreting and enforcing Peruvian real property law. Indeed, the entire case centers around a dispute involving the possessory rights to the Disputed Land—a dispute that relies upon Peruvian law and is currently being adjudicated in the Peruvian courts. (Zapater Decl. ¶ 18.)

Accordingly, the application of Peruvian law to this dispute—law with which the Court is unfamiliar—is a factor that weighs heavily in favor of dismissal.

VI. CONCLUSION

Because an adequate alternative forum exists in Peru and the balance of private and public interest factors weighs heavily in favor of dismissal, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint on the ground of *forum non conveniens*.

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CERTIFICATE OF SERVICE

I, Elena C. Norman, hereby certify that on October 16, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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